Brownstein | Hyatt
Farber | Schreck

Brownstein Hyatt Farber Schreck, LLP
1350 I Street, NW, Suite 510
Washington, D.C. 20005-3355
T 202 296 7353 F 202 296 7009

Fax Cover Sheet

DATE: June 9, 2009

		PHONE NO.	FAX NO.
TO:	FARA Registration Unit		202-514-2836
FROM:	Will Moschella		
RE:	Informational Materials distributed by Brownstein Hyatt Farber Schreck, LLP (#5870) on behalf of Embassy of Mexico		

No. of Pages With Cover Page: 67

IF YOU DO NOT RECEIVE ALL OF THE PAGES, OR IF YOU ENCOUNTER ANY DIFFICULTIES WITH THIS TRANSMISSION, PLEASE CALL OUR OFFICE AT 202.296.7353. THANK YOU

Message:

Attn FARA Registration Unit

Please find attached 67 pages of Information Material distributed by BHFS, LLP (#5870) on behalf of Embassy of Mexico. If you do not receive all 67 pages , please give Theodosia Sorto a call at 202-652-2340

2009 JUN -9 PM 3:30
CRM/CES/REGISTRATION UNIT

Thank you

Will Moschella

Statement of Confidentiality

The information contained in this fax message is attorney privileged and confidential information, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the U.S. Postal Service. Thank you

99001\3\1020805.1

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
Washington, DC 20530

The Honorable Hilary Clinton
Secretary of State
U.S. Department of State
Washington, DC 20520

Dear Attorney General Holder and Secretary Clinton:

We respectfully request the Administration's recommendation on how Congress should respond to the *Case Concerning Avena and Other Mexican Nationals*, 2004, I.C.J. 128 (March 31) and *Medellin v. Texas*, 552 U.S. _____ (2008), and what measures may be taken to educate State and local prosecutors and other officials of the United States' obligations under the Vienna Convention on Consular Relations.

After the U.S. Senate provided its advice and consent, the United States ratified the Vienna Convention on Consular Relations (VCCR) in 1969. Article 36 of the VCCR grants individual foreign nationals a right of access to his or her consulate, and ensures that consulates can visit their nationals and arrange for their legal representation. The receiving state bears the burden for facilitating such access by informing "the person concerned without delay of his rights [under Article 36]." United States citizens rely on the protections of the VCCR every day and the U.S. Government frequently demands compliance with the VCCR to ensure our citizens receive fair treatment when detained abroad.

In 2004, the International Court of Justice (ICJ) determined that the United States had violated Article 36(1)(b) of the VCCR by failing to inform 51 Mexican nationals of their VCCR rights, and by failing to notify consular authorities of the detention of 49 Mexican nationals. The United States voluntarily consented to the ICJ's jurisdiction to hear such complaints when it ratified in 1969 an Optional Protocol Concerning the Compulsory Settlement of Disputes.

On February 28, 2005, President Bush, recognizing that the rule of law required the United States to comply with the ICJ's decision and to continue to preserve these rights for American citizens, issued a determination that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ's] decision in accordance with general principles of comity." The Supreme Court, however, in *Medellin* held that the Optional Protocol is not a self-executing treaty and that the president did not have the authority unilaterally to enforce the decision of the ICJ. The Court held that only Congress can transform a non-self executing treaty into binding federal law.

2009 JUN -9 PM 3:30
CLAIMS REGISTRATION UNIT

This information is provided on behalf of the Embassy of Mexico.

Justice Roberts, writing for the Court, noted that "[n]o one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna convention disputes—constitutes and *international* law obligation on the part of the United States." Nevertheless, the Court held that the Avena judgment did not have automatic domestic legal effect and that, to give it effect, congressional action is required. The rule of law dictates that the United States fulfill its international treaty obligations. Public policy dictates that we do so given our significant national interests in full compliance with the VCCR by other signatory nations, thereby ensuring that our own citizens receive the benefits of the treaty. Finally, Mexico is an important ally and we are concerned that our non-compliance may erode our credibility with the government of Mexico and its people. For these reasons, we would appreciate receiving your recommendations about how Congress should address the *Avena* judgment and subsequent Supreme Court decision in *Medellin v Texas*. We would also appreciate any recommendations you may propose to educate state and local prosecutors and other appropriate officials of our responsibilities under the VCCR.

Thank you for your attention to this important matter. We would appreciate your response no later than June 30, 2009.

Sincerely,

This information is provided on behalf of the Embassy of Mexico.

SUGGESTED STATUTORY MODELS FOR IMPLEMENTATION OF THE AVENA JUDGMENT

Model I:

Notwithstanding any other law, the federal courts shall provide review and reconsideration of the convictions and sentences of the individuals named in the judgment of the International Court of Justice in Avena and Other Mexican Nationals, to determine whether each defendant was prejudiced by the violation of Article 36 of the Vienna Convention on Consular Relations in his case.

Additional Possible Language at the Beginning:
"[In order to uphold the treaty obligations of the United States under the United Nations Charter, Statute of the International Court of Justice, the Vienna Convention on Consular Relations and the Optional Protocol to the Vienna Convention on Consular Relations], the federal courts shall provide review and reconsideration...

Model II:

1. This legislation shall be known as the Protecting Americans' Treaty Rights through Implementation Act (PATRIA).

2. In order to better safeguard the consular treaty rights of Americans abroad, and to give effect to the United States' remaining obligations under the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 21 U.S.T. 325,

   a) Notwithstanding any other law, the federal courts shall implement the operative requirements of the Judgment of March 31, 2004 arising under the aforementioned Optional Protocol in any remaining case identified by the President of the United States in his February 28, 2005 Memorandum to the Attorney General.

   OR

   b) Notwithstanding any other law, the federal courts shall implement the February 28, 2005 Memorandum of the President of the United States to the Attorney General by providing review and reconsideration of the remaining cases identified in the Judgment of March 31, 2004.

This information is provided on behalf of the Embassy of Mexico.

OR

c) Notwithstanding any other law, the February 28, 2005 Memorandum of the President of the United States to the Attorney General shall be given effect by having the federal courts provide the judicial review and reconsideration specified in the Memorandum.

EN BANC

SUZETTE NICOLAS y SOMBILON,
Petitioner,

G.R. No. 175888

Present:

PUNO, *C.J.*,
QUISUMBING,
YNARES-SANTIAGO,
CARPIO,
AUSTRIA-MARTINEZ,
CORONA,
CARPIO MORALES,
AZCUNA,
TINGA,
CHICO-NAZARIO,
VELASCO, JR.,
NACHURA,
LEONARDO-DE CASTRO,
BRION, and
PERALTA, *JJ.*

- versus -

ALBERTO ROMULO, in his capacity as Secretary of Foreign Affairs; RAUL GONZALEZ, in his capacity as Secretary of Justice; EDUARDO ERMITA, in his capacity as Executive Secretary; RONALDO PUNO, in his capacity as Secretary of the Interior and Local Government; SERGIO APOSTOL, in his capacity as Presidential Legal Counsel; and L/CPL. DANIEL SMITH,
Respondents.

X----------X

JOVITO R. SALONGA, WIGBERTO E. TAÑADA, JOSE DE LA RAMA, EMILIO C. CAPULONG, H. HARRY L. ROQUE, JR., FLORIN HILBAY, and BENJAMIN POZON,
Petitioners,

G.R. No. 176051

- versus -

DANIEL SMITH, SECRETARY RAUL GONZALEZ, PRESIDENTIAL LEGAL COUNSEL SERGIO APOSTOL, SECRETARY RONALDO PUNO, SECRETARY ALBERTO ROMULO, The Special 16th Division of the COURT OF APPEALS, and all persons acting in their capacity,
Respondents.

X----------X

BAGONG ALYANSANG MAKABAYAN (BAYAN), represented by Dr. Carol Araullo; GABRIELA, represented by Emerenciana de Jesus; BAYAN MUNA, represented by Rep. Satur Ocampo; GABRIELA WOMEN'S PARTY, represented by Rep. Liza Maza; KILUSANG MAYO UNO (KMU), represented by Elmer Labog; KILUSANG MAGBUBUKID NG PILIPINAS (KMP), represented by Willy Marbella; LEAGUE OF FILIPINO STUDENTS (LFS), represented by Vencer Crisostomo; and THE PUBLIC INTEREST LAW CENTER, represented by Atty. Rachel Pastores,
Petitioners,

G.R. No. 176222

- versus -

PRESIDENT GLORIA MACAPAGAL-ARROYO, in her capacity as concurrent Defense Secretary, EXECUTIVE SECRETARY EDUARDO ERMITA, FOREIGN AFFAIRS SECRETARY ALBERTO ROMULO, JUSTICE SECRETARY RAUL GONZALEZ, AND INTERIOR AND LOCAL GOVERNMENT SECRETARY RONALDO PUNO,
Respondents.

Promulgated:

February 11, 2009

X---------- X

DECISION

AZCUNA, *J.*:

These are petitions for *certiorari*, etc. as special civil actions and/or for review of the Decision of the Court of Appeals in *Lance Corporal Daniel J. Smith v. Hon. Benjamin T Pozon, et al.*, in CA-G.R. SP No. 97212, dated January 2, 2007.

The facts are not disputed.

Respondent Lance Corporal (L/CPL) Daniel Smith is a member of the United States Armed Forces. He was charged with the crime of rape committed against a Filipina, petitioner herein, sometime on November 1, 2005, as follows:

> The undersigned accused LCpl. Daniel Smith, Ssgt. Chad Brian Carpentier, Dominic Duplantis, Keith Silkwood and Timoteo L. Soriano, Jr. of the crime of Rape under Article 266-A of the Revised Penal Code, as amended by Republic Act 8353, upon a complaint under oath filed by Suzette S. Nicolas, which is attached hereto and made an integral part hereof as Annex "A," committed as follows:
>
> > "That on or about the First (1st) day of November 2005, inside the Subic Bay Freeport Zone, Olongapo City and within the jurisdiction of this Honorable Court, the above-named accused's (*sic*), being then members of the United States Marine Corps, except Timoteo L. Soriano, Jr., conspiring, confederating together and mutually helping one another, with lewd design and by means of force, threat and intimidation, with abuse of superior strength and taking advantage of the intoxication of the victim, did then and there willfully, unlawfully and feloniously sexually abuse and have sexual intercourse with or carnal knowledge of one Suzette S. Nicolas, a 22-year old unmarried woman inside a Starex Van with Plate No. WKF-162, owned by Starways Travel and Tours, with Office address at 8900 P. Victor St., Guadalupe, Makati City, and driven by accused Timoteo L. Soriano, Jr., against the will and consent of the said Suzette S. Nicolas, to her damage and prejudice.

CONTRARY TO LAW."[1]

Pursuant to the Visiting Forces Agreement (VFA) between the Republic of the Philippines and the United States, entered into on February 10, 1998, the United States, at its request, was granted custody of defendant Smith pending the proceedings.

During the trial, which was transferred from the Regional Trial Court (RTC) of Zambales to the RTC of Makati for security reasons, the United States Government faithfully complied with its undertaking to bring defendant Smith to the trial court every time his presence was required.

On December 4, 2006, the RTC of Makati, following the end of the trial, rendered its Decision, finding defendant Smith guilty, thus:

> WHEREFORE, premises considered, for failure of the prosecution to adduce sufficient evidence against accused S/SGT. CHAD BRIAN CARPENTER, L/CPL. KEITH SILKWOOD AND L/CPL. DOMINIC DUPLANTIS, all of the US Marine Corps assigned at the USS Essex, are hereby ACQUITTED to the crime charged.
>
> The prosecution having presented sufficient evidence against accused L/CPL. DANIEL J. SMITH, also of the US Marine Corps at the USS Essex, this Court hereby finds him GUILTY BEYOND REASONABLE DOUBT of the crime of RAPE defined under Article 266-A, paragraph 1 (a) of the Revised Penal Code, as amended by R.A. 8353, and, in accordance with Article 266-B, first paragraph thereof, hereby sentences him to suffer the penalty of *reclusion perpetua* together with the accessory penalties provided for under Article 41 of the same Code.
>
> Pursuant to Article V, paragraph No. 10, of the Visiting Forces Agreement entered into by the Philippines and the United States, accused L/CPL. DANIEL J. SMITH shall serve his sentence in the facilities that shall, thereafter, be agreed upon by appropriate Philippine and United States authorities. Pending agreement on such facilities, accused L/CPL. DANIEL J. SMITH is hereby temporarily committed to the Makati City Jail.

---

[1] Annex "B" of RTC Decision, CA *rollo*, p. 45.

Accused L/CPL. DANIEL J. SMITH is further sentenced to indemnify complainant SUZETTE S. NICOLAS in the amount of ₱50,000.00 as compensatory damages plus ₱50,000.00 as moral damages.

SO ORDERED.[2][2]

As a result, the Makati court ordered Smith detained at the Makati jail until further orders.

On December 29, 2006, however, defendant Smith was taken out of the Makati jail by a contingent of Philippine law enforcement agents, purportedly acting under orders of the Department of the Interior and Local Government, and brought to a facility for detention under the control of the United States government, provided for under new agreements between the Philippines and the United States, referred to as the Romulo-Kenney Agreement of December 19, 2006 which states:

> The Government of the Republic of the Philippines and the Government of the United States of America agree that, in accordance with the Visiting Forces Agreement signed between our two nations, Lance Corporal Daniel J. Smith, United States Marine Corps, be returned to U.S. military custody at the U.S. Embassy in Manila.
>
> (Sgd.) KRISTIE A. KENNEY
> Representative of the United States of America
>
> DATE: 12-19-06
>
> (Sgd.) ALBERTO G. ROMULO
> Representative of the Republic of the Philippines
>
> DATE: December 19, 2006

and the Romulo-Kenney Agreement of December 22, 2006 which states:

> The Department of Foreign Affairs of the Republic of the Philippines and the Embassy of the United States of America agree that, in accordance with the Visiting Forces Agreement signed between the two nations, upon

---

[2][2] Annex "B" of CA *rollo*, pp. 36-96.

> transfer of Lance Corporal Daniel J. Smith, United States Marine Corps, from the Makati City Jail, he will be detained at the first floor, Rowe (JUSMAG) Building, U.S. Embassy Compound in a room of approximately 10 x 12 square feet. He will be guarded round the clock by U.S. military personnel. The Philippine police and jail authorities, under the direct supervision of the Philippine Department of Interior and Local Government (DILG) will have access to the place of detention to ensure the United States is in compliance with the terms of the VFA.

The matter was brought before the Court of Appeals which decided on January 2, 2007, as follows:

> WHEREFORE, all the foregoing considered, we resolved to DISMISS the petition for having become moot.[3][3]

Hence, the present actions.

The petitions were heard on oral arguments on September 19, 2008, after which the parties submitted their memoranda.

Petitioners contend that the Philippines should have custody of defendant L/CPL Smith because, first of all, the VFA is void and unconstitutional.

This issue had been raised before, and this Court resolved in favor of the constitutionality of the VFA. This was in *Bayan v. Zamora*,[4][4] brought by *Bayan*, one of petitioners in the present cases.

Against the barriers of *res judicata* vis-à-vis *Bayan*, and *stare decisis* vis-à-vis all the parties, the reversal of the previous ruling is sought on the ground that the issue is of primordial importance, involving the sovereignty of the Republic, as well as a specific mandate of the Constitution.

3[3] *Rollo*, pp. 90-127

4[4] G.R. No. 138570, October 10, 2000, 342 SCRA 449.

The provision of the Constitution is Art. XVIII, Sec. 25 which states:

> Sec. 25. After the expiration in 1991 of the Agreement between the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

The reason for this provision lies in history and the Philippine experience in regard to the United States military bases in the country.

It will be recalled that under the Philippine Bill of 1902, which laid the basis for the Philippine Commonwealth and, eventually, for the recognition of independence, the United States agreed to cede to the Philippines all the territory it acquired from Spain under the Treaty of Paris, plus a few islands later added to its realm, except certain naval ports and/or military bases and facilities, which the United States retained for itself.

This is noteworthy, because what this means is that Clark and Subic and the other places in the Philippines covered by the RP-US Military Bases Agreement of 1947 were not Philippine territory, as they were excluded from the cession and retained by the US.

Accordingly, the Philippines had no jurisdiction over these bases except to the extent allowed by the United States. Furthermore, the RP-US Military Bases Agreement was never advised for ratification by the United States Senate, a disparity in treatment, because the Philippines regarded it as a treaty and had it concurred in by our Senate.

Senate for advice and consent agreements that are policymaking in nature, whereas those that carry out or further implement these policymaking agreements are merely submitted to Congress, under the provisions of the so-called Case–Zablocki Act, within sixty days from ratification.[6][6]

The second reason has to do with the relation between the VFA and the RP-US Mutual Defense Treaty of August 30, 1951. This earlier agreement was signed and duly ratified with the concurrence of both the Philippine Senate and the United States Senate.

The RP-US Mutual Defense Treaty states:[7][7]

> MUTUAL DEFENSE TREATY BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE UNITED STATES OF AMERICA. Signed at Washington, August 30, 1951.
>
> The Parties of this Treaty
>
> Reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments, and desiring to strengthen the fabric of peace in the Pacific area.
>
> Recalling with mutual pride the historic relationship which brought their two peoples together in a common bond of sympathy and mutual ideals to fight side-by-side against imperialist aggression during the last war.

6[6] The Case-Zablocki Act, 1 U.S.C. 112b (a) (1976 ed., Supp IV). *See* also *Weinberger v. Rossi*, 456 U.S. 25 (1982), in which the U.S. Supreme Court sustained recognition as a "treaty" of agreements not concurred in by the U.S. Senate

7[7] The RP-US Mutual Defense Treaty was signed in Washington, D.C. on August 30, 1951. Its ratification was advised by the US Senate on March 20, 1952, and the US President ratified the Treaty on April 15, 1952.

The Treaty was concurred in by the RP Senate, S.R. No. 84, May 12, 1952. The Philippine instrument of ratification was signed by the RP President on August 27, 1952. The Agreement entered into force on August 27, 1952 upon the exchange of ratification between the Parties.

This Agreement is published in 11 DFA TS No. 1, p. 13; 177 UNTS, p. 133; 3 UST 3847-3952. The RP Presidential proclamation of the Agreement, Proc. No. 341, S. 1952, is published in 48 O.G. 4224 (Aug. 1952)

Desiring to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific area.

Desiring further to strengthen their present efforts for collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific area.

Agreeing that nothing in this present instrument shall be considered or interpreted as in any way or sense altering or diminishing any existing agreements or understandings between the Republic of the Philippines and the United States of America.

Have agreed as follows:

ARTICLE I. The parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relation from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

ARTICLE II. In order more effectively to achieve the objective of this Treaty, the **Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack.**

ARTICLE III. The Parties, through their Foreign Ministers or their deputies, will consult together from time to time regarding the implementation of this Treaty and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties is threatened by external armed attack in the Pacific.

ARTICLE IV. Each Party recognizes that an armed attack in the Pacific area on either of the parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations.

Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

ARTICLE V. For the purpose of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific.

ARTICLE VI. This Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations of the Parties under the Charter of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security.

ARTICLE VII. This Treaty shall be ratified by the Republic of the Philippines and the United Nations of America in accordance with their respective constitutional processes and will come into force when instruments of ratification thereof have been exchanged by them at Manila.

ARTICLE VIII. This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other party.

IN WITHNESS WHEREOF the undersigned Plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington this thirtieth day of August, 1951.

For the Republic of the Philippines:

(Sgd.) CARLOS P. ROMULO
(Sgd.) JOAQUIN M. ELIZALDE
(Sgd.) VICENTE J. FRANCISCO
(Sgd.) DIOSDADO MACAPAGAL

For the United States of America:

(Sgd.) DEAN ACHESON
(Sgd.) JOHN FOSTER DULLES
(Sgd.) TOM CONNALLY

(Sgd.) ALEXANDER WILEY[8]

Clearly, therefore, joint RP-US military exercises for the purpose of developing the capability to resist an armed attack fall squarely under the provisions of the RP-US Mutual Defense Treaty. The VFA, which is the instrument agreed upon to provide for the joint RP-US military exercises, is simply an implementing agreement to the main RP-US Military Defense Treaty. The Preamble of the VFA states:

> The Government of the United States of America and the Government of the Republic of the Philippines,
>
> Reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to strengthen international and regional security in the Pacific area;
>
> **Reaffirming their obligations under the Mutual Defense Treaty of August 30, 1951**;
>
> **Noting that from time to time elements of the United States armed forces may visit the Republic of the Philippines**;
>
> Considering that **cooperation between the United States and the Republic of the Philippines promotes their common security interests**;
>
> Recognizing the desirability of defining the treatment of United States personnel visiting the Republic of the Philippines;
>
> Have agreed as follows:[9]

Accordingly, as an implementing agreement of the RP-US Mutual Defense Treaty, it was not necessary to submit the VFA to the US Senate for advice and consent, but merely to the US Congress under the Case–Zablocki Act within 60 days of its ratification. It is for this reason that the US has certified that it recognizes the VFA as a binding

---

8 Emphasis supplied.
9 Emphasis supplied

international agreement, *i.e.*, a treaty, and this substantially complies with the requirements of Art. XVIII, Sec. 25 of our Constitution.[10[10]]

The provision of Art. XVIII, Sec. 25 of the Constitution, is complied with by virtue of the fact that the presence of the US Armed Forces through the VFA is a presence "allowed under" the RP-US Mutual Defense Treaty. Since the RP-US Mutual Defense Treaty itself has been ratified and concurred in by both the Philippine Senate and the US Senate, there is no violation of the Constitutional provision resulting from such presence.

The VFA being a valid and binding agreement, the parties are required as a matter of international law to abide by its terms and provisions.

The VFA provides that in cases of offenses committed by the members of the US Armed Forces in the Philippines, the following rules apply:

> Article V
> Criminal Jurisdiction
>
> x x x
>
> 6. The custody of any United States personnel over whom the Philippines is to exercise jurisdiction shall immediately reside with United States military authorities, if they so request, from the commission of the offense until completion of all judicial proceedings. United States military authorities shall, upon formal notification by the Philippine authorities and without delay, make such personnel available to those authorities in time for any investigative or judicial proceedings relating to the offense with which the person has been charged. In extraordinary cases, the Philippine Government shall present its position to the United States Government regarding custody, which the United States Government shall take into full account. In the event Philippine judicial proceedings are not completed within one year, the United States shall be relieved of any obligations under this paragraph. The one year period will not include the time necessary to appeal. Also, the one year period will not include any time during which

---

10[10] *See* Letter of Ambassador Thomas C. Hubbard quoted in *Bayan*, 342 SCRA 449, 491

> scheduled trial procedures are delayed because United States authorities, after timely notification by Philippine authorities to arrange for the presence of the accused, fail to do so.

Petitioners contend that these undertakings violate another provision of the Constitution, namely, that providing for the exclusive power of this Court to adopt rules of procedure for all courts in the Philippines (Art. VIII, Sec. 5[5]). They argue that to allow the transfer of custody of an accused to a foreign power is to provide for a different rule of procedure for that accused, which also violates the equal protection clause of the Constitution (Art. III, Sec. 1.).

Again, this Court finds no violation of the Constitution.

The equal protection clause is not violated, because there is a substantial basis for a different treatment of a member of a foreign military armed forces allowed to enter our territory and all other accused.[11[11]]

The rule in international law is that a foreign armed forces allowed to enter one's territory is immune from local jurisdiction, except to the extent agreed upon. The Status of Forces Agreements involving foreign military units around the world vary in terms and conditions, according to the situation of the parties involved, and reflect their bargaining power. But the principle remains, *i.e.*, the receiving State can exercise jurisdiction over the forces of the sending State only to the extent agreed upon by the parties.[12[12]]

As a result, the situation involved is not one in which the power of this Court to adopt rules of procedure is curtailed or violated, but rather one in which, as is normally encountered around the world, the laws (including rules of procedure) of one State do not extend or apply – **except to the extent agreed upon** – to subjects of another State due to

---

11[11] *See*, the summation of the rule on equal protection in ISAGANI A. CRUZ, CONSTITUTIONAL LAW, pp. 123-139 (2007), and the authorities cited therein.

12[12] *See* Dieter Fleck, Ed., The HANDBOOK OF THE LAW OF VISITING FORCES , Oxford: 2001.

the recognition of extraterritorial immunity given to such bodies as visiting foreign armed forces.

Nothing in the Constitution prohibits such agreements recognizing immunity from jurisdiction or some aspects of jurisdiction (such as custody), in relation to long-recognized subjects of such immunity like Heads of State, diplomats and members of the armed forces contingents of a foreign State allowed to enter another State's territory. On the contrary, the Constitution states that the Philippines adopts the generally accepted principles of international law as part of the law of the land. (Art. II, Sec. 2).

Applying, however, the provisions of VFA, the Court finds that there is a different treatment when it comes to detention as against custody. The moment the accused has to be detained, *e.g.*, after conviction, the rule that governs is the following provision of the VFA:

> Article V
> Criminal Jurisdiction
>
> x x x
>
> Sec. 10. The confinement or detention by Philippine authorities of United States personnel shall be carried out in facilities agreed on by appropriate Philippines and United States authorities. United States personnel serving sentences in the Philippines shall have the right to visits and material assistance.

It is clear that the parties to the VFA recognized the difference between custody during the trial and detention after conviction, because they provided for a specific arrangement to cover detention. And this specific arrangement clearly states not only that the detention shall be carried out in facilities agreed on by authorities of both parties, but also that the detention shall be "by Philippine authorities." Therefore, the Romulo-Kenney Agreements of December 19 and 22, 2006, which are agreements on the detention of the

accused **in the United States Embassy**, are not in accord with the VFA itself because such detention is not "by Philippine authorities."

Respondents should therefore comply with the VFA and negotiate with representatives of the United States towards an agreement on detention facilities under Philippine authorities as mandated by Art. V, Sec. 10 of the VFA.

Next, the Court addresses the recent decision of the United States Supreme Court in *Medellin v. Texas* (552 US ___ No. 06-984, March 25, 2008), which held that treaties entered into by the United States are not automatically part of their domestic law unless these treaties are self-executing or there is an implementing legislation to make them enforceable.

On February 3, 2009, the Court issued a Resolution, thus:

"G.R. No. 175888 (Suzette Nicolas y Sombilon v. Alberto Romulo, et al.); G.R. No. 176051 (Jovito R. Salonga, et al. v. Daniel Smith, et al.); and G.R. No. 176222 (Bagong Alyansang Makabayan [BAYAN], et al. v. President Gloria Macapagal-Arroyo, et al.).

The parties, including the Solicitor General, are required to submit within three (3) days a Comment/Manifestation on the following points:

1. What is the implication on the RP-US Visiting Forces Agreement of the recent US Supreme Court decision in *Jose Ernesto Medellin v. Texas*, dated March 25, 2008, to the effect that treaty stipulations that are not self-executory can only be enforced pursuant to legislation to carry them into effect; and that, while treaties may comprise international commitments, they are not domestic law unless Congress has enacted implementing statutes or the treaty itself conveys an intention that it be "self-executory" and is ratified on these terms?

2. Whether the VFA is enforceable in the US as domestic law, either because it is self-executory or because there exists legislation to implement it.

3. Whether the RP-US Mutual Defense Treaty of August 30, 1951 was concurred in by the US Senate and, if so, is there proof of the US Senate advice and consent resolution? Peralta, J., no part."

After deliberation, the Court holds, on these points, as follows:

First, the VFA is a self-executing Agreement, as that term is defined in *Medellin* itself, because the parties intend its provisions to be enforceable, precisely because the Agreement is intended to carry out obligations and undertakings under the RP-US Mutual Defense Treaty. As a matter of fact, the VFA has been implemented and executed, with the US faithfully complying with its obligation to produce L/CPL Smith before the court during the trial.

Secondly, the VFA is covered by implementing legislation, namely, the Case-Zablocki Act, USC Sec. 112(b), inasmuch as it is the very purpose and intent of the US Congress that executive agreements registered under this Act within 60 days from their ratification be immediately implemented. The parties to these present cases do not question the fact that the VFA has been registered under the Case-Zablocki Act.

In sum, therefore, the VFA differs from the Vienna Convention on Consular Relations and the *Avena* decision of the International Court of Justice (ICJ), subject matter of the *Medellin* decision. The Convention and the ICJ decision are not self-executing and are not registrable under the Case-Zablocki Act, and thus lack legislative implementing authority.

Finally, the RP-US Mutual Defense Treaty was advised and consented to by the US Senate on March 20, 1952, as reflected in the US Congressional Record, 82nd Congress, Second Session, Vol. 98 – Part 2, pp. 2594-2595.

The framers of the Constitution were aware that the application of international law in domestic courts varies from country to country.

As Ward N. Ferdinandusse states in his Treatise, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS, some countries require legislation whereas others do not.

It was not the intention of the framers of the 1987 Constitution, in adopting Article XVIII, Sec. 25, to require the other contracting State to convert their system to achieve alignment and parity with ours. It was simply required that the treaty be recognized as a treaty by the other contracting State. With that, it becomes for both parties a binding international obligation and the enforcement of that obligation is left to the normal recourse and processes under international law.

Furthermore, as held by the US Supreme Court in *Weinberger v. Rossi*,[13[13]] an executive agreement is a "treaty" within the meaning of that word in international law and constitutes enforceable domestic law *vis-à-vis* the United States. Thus, the US Supreme Court in *Weinberger* enforced the provisions of the executive agreement granting preferential employment to Filipinos in the US Bases here.

Accordingly, there are three types of treaties in the American system:

1. Art. II, Sec. 2 treaties – These are advised and consented to by the US Senate in accordance with Art. II, Sec. 2 of the US Constitution.

2. Executive–Congressional Agreements: These are joint agreements of the President and Congress and need not be submitted to the Senate.

3. Sole Executive Agreements. – These are agreements entered into by the President. They are to be submitted to Congress within sixty (60) days of

---

13[13] *Supra*, Note 6.

ratification under the provisions of the Case-Zablocki Act, after which they are recognized by the Congress and may be implemented.

As regards the implementation of the RP-US Mutual Defense Treaty, military aid or assistance has been given under it and this can only be done through implementing legislation. The VFA itself is another form of implementation of its provisions.

WHEREFORE, the petitions are **PARTLY GRANTED**, and the Court of Appeals' Decision in CA-G.R. SP No. 97212 dated January 2, 2007 is **MODIFIED**. The Visiting Forces Agreement (VFA) between the Republic of the Philippines and the United States, entered into on February 10, 1998, is **UPHELD as constitutional**, but the Romulo-Kenney Agreements of December 19 and 22, 2006 are **DECLARED not in accordance with the VFA**, and respondent Secretary of Foreign Affairs is hereby ordered to forthwith negotiate with the United States representatives for the appropriate agreement on detention facilities under Philippine authorities as provided in Art. V, Sec. 10 of the VFA, pending which the *status quo* shall be maintained until further orders by this Court.

The Court of Appeals is hereby directed to resolve without delay the related matters pending therein, namely, the petition for contempt and the appeal of L/CPL Daniel Smith from the judgment of conviction.

No costs.

SO ORDERED.

ADOLFO S. AZCUNA
Associate Justice

WE CONCUR:

REYNATO S. PUNO
Chief Justice

LEONARDO A. QUISUMBING
Associate Justice

CONSUELO YNARES-SANTIAGO
Associate Justice

ANTONIO T. CARPIO
Associate Justice

MA. ALICIA AUSTRIA-MARTINEZ
Associate Justice

RENATO C. CORONA
Associate Justice

CONCHITA CARPIO MORALES
Associate Justice

DANTE O. TINGA
Associate Justice

MINITA V. CHICO-NAZARIO
Associate Justice

PRESBITERO J. VELASCO, JR.
Associate Justice

ANTONIO EDUARDO B. NACHURA
Associate Justice

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

ARTURO D. BRION
Associate Justice

DIOSDADO M. PERALTA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

REYNATO S. PUNO
Chief Justice

G.R. NO. 175888 - SUZETTE NICOLAS Y SOMBILON v. ALBERTO ROMULO, ET AL.

G.R. NO. 176051 - JOVITO R. SALONGA ET AL. v. DANIEL SMITH, ET AL.

G.R. NO. 176222 - BAGONG ALYANSANG MAKABAYAN (BAYAN), ET AL. v. PRESIDENT GLORIA MACAPAGAL-ARROYO, ET AL.

Promulgated: February 11, 2009

x----------x

DISSENTING OPINION

PUNO, *C.J.:*

The question of the constitutionality of the Visiting Forces Agreement (VFA) comes back to this Court as the custody over Lance Corporal Daniel J. Smith, a member of the US Armed Forces found guilty of rape by the Regional Trial Court (RTC) of Makati, is put at issue in the case at bar pending appeal of his conviction.

I strongly dissented in the case of **Bayan v. Zamora**[14][1] proffering the view that the VFA falls short of the requirement set by Section 25, Article XVIII of the 1987 Constitution stating that the agreement allowing the presence of foreign military troops in the Philippines must be "recognized as a treaty by the other contracting state."[15][2] The circumstances present in the case at bar and recent case law in the United States' policy on treaty enforcement further expose the anomalous asymmetry in the legal treatment of the VFA by the United States (U.S.) as opposed to the Republic of the Philippines (RP) which I denounced in **Bayan v. Zamora**. This slur on our sovereignty cannot continue, especially if we are the ones perpetuating it.

---

[14][1] *See* G.R. No. 138570, October 10, 2000, 342 SCRA 449, 497-521.
[15][2] CONSTITUTION, Sec. 25, Art. XVIII.

The present petitions challenge the transfer of custody of Daniel Smith from the Philippine government (under the Bureau of Jail Management and Penology) to the United States authorities.

On December 4, 2006, Respondent Daniel Smith was convicted of rape by RTC Makati Branch 139.[16][3] Smith's temporary confinement at the Makati City Jail was subsequently ordered by the trial court pending negotiations between the U.S. and RP governments. Respondent Smith filed a motion for reconsideration on December 5, 2006.[17][4]

On December 8, 2006, the public prosecutor filed a manifestation before the trial court submitting an agreement signed on the same day by Ambassador Kristie Kenney and Chief State Prosecutor Jovencito Zuno. The agreement provided for the transfer of custody over Smith from the Philippine government to the U.S. Embassy. A similar agreement was later submitted, but this time executed between the U.S. Ambassador and Secretary of Justice Raul Gonzalez and Secretary of Foreign Affairs Alberto Romulo.[18][5]

On December 12, 2006, the trial court denied Respondent Smith's motion for reconsideration.[19][6] He filed a petition for certiorari with prayer for Temporary Restraining Order before the Court of Appeals on December 14, 2006.[20][7]

A petition in intervention and a series of manifestations[21][8] were filed by the Department of Foreign Affairs, all appending copies of the Romulo-Kenney agreement. The Solicitor General adopted the position of the Department of Foreign Affairs in a

---

[16][3] Presided over by Petitioner Benjamin Pozon; *rollo*, p. 10, 53
[17][4] *Rollo*, p. 10.
[18][5] *Rollo*, p. 11.
[19][6] *Rollo*, pp. 11, 54.
[20][7] *Rollo*, pp. 12, 54
[21][8] Dated respectively, December 18, 2006 and December 20, 2006.

manifestation filed on December 28, 2006.[22][9] The next day, Smith's custody was turned over to the U.S. authorities and Smith was physically transferred to the U.S. Embassy.[23][10]

On January 3, 2007, the Court of Appeals[24][11] issued a decision holding as moot the petition filed before it by respondent Smith.[25][12]

Hence, the present petitions, which assail anew the non-recognition by the U.S. of the VFA as a treaty.

Respondent Sergio Apostol and the Solicitor General raise the defense of *stare decisis*[26][13] and *res judicata*[27][14] as against the petitioners' attempt to assail the validity of the VFA, citing **Bayan v. Zamora** and **Lim v. Executive Secretary**.

An examination of *Bayan v. Zamora*, which upheld the validity of the VFA, is necessary in light of a recent change in U.S. policy on treaty enforcement. Of significance is the case of *Medellin v. Texas*,[28][15] where it was held by the U.S. Supreme Court that while treaties entered into by the President with the concurrence of the Senate are binding international commitments, they are not domestic law unless Congress enacts implementing legislation or unless the treaty itself is "self-executing."[29][16]

22[9] *Rollo*, p. 56.
23[10] *Rollo*, pp. 14, 56.
24[11] Through its Special 16th Division
25[12] *Rollo*, p. 14, 56. The Decision is dated January 2, 2007
26[13] *Rollo*, p. 238 Relying on *Bayan v. Zamora*.
27[14] *Rollo*, pp. 64-6.
28[15] 522 U.S. [Not yet numbered for citation purposes], March 25, 2008; 128 S. Ct. 1346 (2008).
29[16] The label "self-executing" pertains to the automatic domestic effect of a treaty as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress [522 U.S. (Not yet numbered for citation purposes), p. 15, March 25, 2008].

An Examination of **Medellin v. Texas**

In **Medellin v. Texas**, Jose Ernesto Medellin (Medellin), a Mexican national, was convicted of capital murder and sentenced to death in Texas for the gang rape and brutal murders of two Houston teenagers. His conviction and sentence were affirmed on appeal.

Medellin then filed an application for post-conviction relief and claimed that the Vienna Convention on Consular Relations (Vienna Convention) accorded him the right to notify the Mexican consulate of his detention; and because the local law enforcement officers failed to inform him of this right, he prayed for the grant of a new trial.

The trial court, as affirmed by the Texas Court of Criminal Appeals, rejected the Vienna Convention claim. It was ruled that Medellin failed to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. Medellin then filed his first *habeas corpus* petition in the Federal District Court, which also rejected his petition. It held that Medellin failed to show prejudice arising from the Vienna Convention.

While Medellin's petition was pending, the International Court of Justice (ICJ) issued its decision in the **Case Concerning Avena and Other Mexican Nationals (Avena)**. The ICJ held that the U.S. violated Article 36(1)(b) of the Vienna Convention by failing to inform 51 named Mexican nationals, including Medellin, of their Vienna Convention rights. The ICJ ruled that those named individuals were entitled to a review and reconsideration of their U.S. state court convictions and sentences regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions.

In **Sanchez-Llamas v. Oregon**[30][17] -- issued after **Avena** but involving individuals who were not named in the **Avena** judgment, contrary to the ICJ's determination -- the U.S. Federal Supreme Court held that the Vienna Convention did not preclude the application of state default rules. The U.S. President, George W. Bush, then issued a Memorandum (President's Memorandum) stating that the United States would discharge its international obligations under **Avena** by having State courts give effect to the decision.

Relying on **Avena** and the President's Memorandum, Medellin filed a second Texas state-court *habeas corpus* application, challenging his state capital murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention rights. The Texas Court of Criminal Appeals dismissed Medellin's application as an abuse of the writ, since under Texas law, a petition for *habeas corpus* may not be filed successively, and neither **Avena** nor the President's Memorandum was binding federal law that could displace the State's limitations on filing successive *habeas* applications.

Medellin repaired to the U.S. Supreme Court. In his petition, Medellin contends that the Optional Protocol, the United Nations Charter, and the ICJ Statute supplied the "relevant obligation"[31][18] to give the **Avena** judgment binding effect in the domestic courts of the United States.

The Supreme Court of the United States ruled that neither **Avena** nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive *habeas corpus* petitions. It held that while an international treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or unless the treaty itself is "self-executing." It further held that decisions of the ICJ are not binding domestic law; and that,

---

[30][17] 548 U.S. 331(2006)
[31][18] 522 U.S. [Not yet numbered for citation purposes], p. 10, March 25, 2008.

absent an act of Congress or Constitutional authority, the U.S. President lacks the power to enforce international treaties or decisions of the ICJ.

Requirements for Domestic Enforceability of Treaties in the U.S.

The new ruling is clear-cut: "while a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be "self-executing" and is ratified on that basis."[32][19]

The **Avena** judgment creates an international law obligation on the part of the United States, **but it is not automatically binding** domestic law because none of the relevant treaty sources—the Optional Protocol, the U.N. Charter, or the ICJ Statute—creates binding federal law in the absence of implementing legislation, and no such legislation has been enacted.

The Court adopted a **textual approach** in determining whether the relevant treaty sources are self-executory. The obligation to comply with ICJ judgments is derived from Article 94 of the U.N. Charter, which provides that "each x x x Member x x x undertakes to comply with the [ICJ's decision x x x in any case to which it is a party." The phrase "undertakes to comply" is simply a commitment by member states to take future action through their political branches. The language does not indicate that the Senate, in ratifying the Optional Protocol, intended to vest ICJ decisions with immediate effect in domestic courts.

This is buttressed by Article 94(2) of the U.N. Charter, which provides that:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make

[32][19] 522 US [Not yet numbered for citation purposes], p 2 (Syll.), March 25, 2008; 128 S. Ct. 1346 (2008).

recommendations or decide upon measures to be taken to give effect to the judgment.[33][20]

Article 94 confirms that the U.N. Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts. The **sole remedy** for non-compliance is referral to the U.N. Security Council by an aggrieved state. Since the remedy was non-judicial, but diplomatic, the U.S. Supreme Court concluded that ICJ judgments were not meant to be enforceable in domestic courts.[34][21] The reasons were, first, the Security Council deems as necessary the issuance of a recommendation or measure to effectuate the judgment; and second, the President and the Senate were undoubtedly aware that the U.S. retained the unqualified right to veto any Security Council resolution.

The **interpretative or textual approach** in determining whether a treaty is self-executory has previously been used by the U.S. Supreme Court. The Court cites **Foster v. Neilson,**[35][22] where the treaty in question was first determined by the Court to be non-self-executing; after four years, another claim was made based on the same treaty and the Supreme Court concluded that it was self-executory, based on the wording of a Spanish translation, which was for the first time brought to the attention of the Court. The self-executory nature was reflected in the words: "by force of the instrument itself."[36][23] General principles of interpretation would confirm that any intent of the ratifying parties to the relevant treaties to give ICJ judgments binding effect in their domestic courts should be clearly stated in the treaty.

In fine, the U.S. President's authority to enter into treaties that are enforceable within its domestic sphere was severely limited by **Medellin**. In **Medellin,** the United States posited the theory that the President's constitutional role uniquely qualifies him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision.

---

[33][20] 59 Stat. 1051.
[34][21] 522 U.S. [Not yet numbered for citation purposes] at 13, March 25, 2008.
[35][22] 2 Pet. 253, 314.
[36][23] *United States v. Percheman*, 7 Pet. 87 (1833(.

In said case, the U.S. President, through the issuance of the Memorandum, sought to vindicate the United States interest in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. Though these interests were compelling, the Supreme Court held that "the president's authority to act, as with the exercise of any governmental power, must stem from an act of Congress or from the Constitution itself."[37][24]

The United States contended that the President's Memorandum was grounded on the first category of the **Youngstown** framework,[38][25] *i.e.*, the President has acted pursuant to an express or implied authorization by Congress, and his authority is at its maximum. In rejecting the argument, the U.S. Supreme Court held:

> **The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.** The responsibility for transforming an international obligation into domestic law falls to Congress. x x x As this court has explained, when treaty stipulations are "not self-executing they can only be enforced pursuant to legislation to carry them into effect." x x x Moreover, "[u]ntil such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject." x x x
>
> The requirement that Congress, rather than the President, implement a non-self executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate. The

---

[37][24] *Medellin v Texas*, 522 U.S. [Not yet numbered for citation purposes], p. 28, March 25, 2008; *citing Youngstown Steel Tubing Co*, 128 S. Ct. 1346 (2008).

[38][25] In *Youngstown Sheet & Tube Company v Sawyer* [343 U.S. 579 (1952)] a tripartite scheme was used as a framework for evaluating executive action. First, when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. Second, when the President acts in absence of either congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and congress have concurrent authority, or which its distribution is uncertain. In such a circumstance, Presidential authority can derive support from congressional inertia, indifference or quiescence. Finally, when the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb. [343 U.S. 579, 637-638 (1952)]

> Constitution vests the President with the authority to "make" a treaty. x x x If the Executive determines that a treaty should have domestic effect of its own force, the determination may be implemented "in [m]aking" the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote, consistent with all other constitutional restraints.[39][20]

Clearly, the President's Memorandum was not enough reason to support the enforcement of any treaty granting Medellin a new trial because of the failure of the local enforcement officers to inform him of his right to notify the Mexican consulate of his detention. The Court categorically held that while a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it, or the treaty itself conveys an intention that it be "self-executing" and is ratified on that basis.

The U.S. Court ruled that President George W. Bush's Memorandum, which stated that the ICJ's **Avena** decision should be given effect by domestic courts, fell within the last category of the **Youngstown** Framework.

In sum, the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vest the President with authority to unilaterally make treaty obligations binding on domestic courts, but also prohibits him from doing so. The responsibility to transform an international obligation arising from a non-self-executing treaty into domestic law falls on Congress, not the Executive.

Implication of* Medellin v. Texas *on the VFA

---

[39][20] *Medellin v Texas*, 522 U.S. [Not yet numbered for citation purposes], pp. 30-31, March 25, 2008, 128 S. Ct. 1346 (2008).

With **Medellin**, the case law is now settled that acknowledgement by the U.S. President that an agreement is a treaty, even with the concurrence of the U.S. Senate, is not sufficient to make a treaty enforceable in its domestic sphere, unless the words of the treaty itself clearly express the intention to make the treaty self-executory, or unless there is corresponding legislative enactment providing for its domestic enforceability. **The VFA does not satisfy either of these requirements and cannot thus be enforced within the U.S.**

I **reiterate** my dissent in **Bayan v. Zamora** that the VFA failed to meet the constitutional requirement of recognition by the U.S. as a treaty.

The 1987 Constitution provides in Sec. 25, Art. XVIII, *viz.*:

> After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and **recognized as a treaty by the other contracting State.** (Emphasis supplied)

Among the three constitutional requisites that must be complied with before foreign military bases, troops, or facilities can be allowed in Philippine territory, the **third requirement**, that any such agreement should be recognized as a treaty by the other contracting party, lies at the very heart of this case.

In **Bayan v. Zamora**, the majority of the Court anchored the validity of the VFA on the flabby conclusion that it was recognized as a treaty by the U.S. The Court held that the phrase "recognized as a treaty" means that the other contracting party accepts or acknowledges the agreement as a treaty. It was held that "it is inconsequential whether the United States treats the VFA only as an executive agreement because, under international law, an executive agreement is binding as a treaty. To be sure, as long as the VFA

possesses the elements of an agreement under international law, the said agreement is to be taken equally as a treaty."[40][27]

To justify its tortuous conclusion, the majority of the Court in Bayan v. Zamora did not accord strict meaning to the phrase, "recognized as a treaty"[41][28] and declared that "words used in the Constitution are to be given their ordinary meaning except where technical terms are employed, in which case the significance thus attached to them prevails. Its language should be understood in the sense they have in common use."[42][29] Thus, the Court held that **it was sufficient** that the other contracting party accepts or acknowledges the agreement as a treaty.

In obvious error, the majority of the Court gave undue deference to the statement of the former Ambassador of the United States to the Philippines, Thomas C. Hubbard, that Senate advice and consent was not needed to consider a treaty binding on the U.S., on the premise that the President alone had the power to conclude the VFA, deriving from his responsibilities for the conduct of foreign relations and his constitutional powers as the Commander–in-Chief of the Armed Forces, to conclude that the U.S. accepted or acknowledged the agreement as a treaty. The majority then jumped to the conclusion that the U.S. recognized the VFA as a treaty, and that the constitutional requirements had been satisfied.

It can be deduced from the posture of the former US Ambassador that the VFA is an executive agreement, entered into by the President under his responsibility for the conduct of foreign relations and his constitutional powers as Commander-in-Chief of the Armed Forces. It can be further deduced that the VFA is not recognized as a treaty by the U.S., but it is akin to a sole or presidential executive agreement, which would be valid if concluded on the basis of the U.S. President's exclusive power under the U.S.

40[27] *Bayan v Zamora*, G.R. No. 138570, October 10, 2000, 342 SCRA 449, 488.
41[28] CONSTITUTION, Art XVIII, Sec. 25.
42[29] Id.

Constitution.[43][30] In other words, it does not fall under the category of an executive agreement entered into by the President pursuant to the authority conferred in a prior treaty because, although the VFA makes reference to the Mutual Defense Treaty in its Preamble, the Mutual Defense Treaty itself does not confer authority upon the U.S. President to enter into executive agreements in the implementation of the Treaty.[44][31] Neither does the VFA fall under the category of Congressional Executive Agreement, as it was not concluded by the U.S. President pursuant to Congressional authorization or enactment, nor has it been confirmed by the U.S. Congress.[45][32]

Prescinding from these premises, the following are the implications of the ruling in **Medellin** on the RP-U.S. VFA:

(1) It must be clear from the text of the VFA itself that the VFA is self-executory in order that it may be reciprocally enforced.

Medellin is straightforward in ruling that the domestic enforceability of the treaty should be reflected in the text of the treaty itself; it cannot simply be inferred from a multitude of factors, nor can it be derived from the context in which the agreement was entered into.

In **Medellin**, the U.S. Court ruled that the Supremacy Clause does not require Texas to enforce the ICJ judgment. The President alone cannot require Texas to comply with a non-self-executing treaty absent congressional implementation. **Medellin** now imposes a **"clear statement requirement"** of the self-executory nature of a treaty, before judgments based on that treaty could overrule state law and be enforced domestically. The Court now looks into the language of the treaty, parsing the treaty's text to determine whether the treaty was intended to be self-executory or not. If the text of the treaty does not clearly indicate the intention of the signatories to make it executory in the domestic sphere,

---

[43][30] *Supra*, note 26 at 509.
[44][31] Id at pp. 509-510.
[45][32] Id at p. 511.

Congress has the responsibility to transform an international obligation arising from a non-self-executory treaty into domestic law.

An examination of the text of the VFA does not show any provision that would satisfy the "clear statement requirement" within the text of the treaty to show that the United States intended it to be reciprocally enforced in the domestic sphere. Absent such clear wording in the VFA itself that it is to be self-executory, and without the concurrence of the Senate, the VFA remains an international obligation of the U.S., but it does not have the corresponding mechanism to have the rights and obligations found therein enforced against the U.S. This is especially true when the enforcement of such rights would cause a violation of U.S. domestic laws, whether substantive or procedural.

(2) The recognition of the President through the former U.S. Ambassador that the VFA is a treaty is insufficient to make this international obligation executory in the domestic sphere.

Previously, a multi-factor, context-specific approach could be employed in judging the reciprocal enforceability of treaties. This gave the U.S. a window to regard the VFA in the same manner and with the same force as the Philippines does. In **Bayan**, the letter of the former United States Ambassador made the assumption that the VFA did not *per se* change U.S. domestic law, and as such, it did not require the concurrence of Senate. Nevertheless, it must be noted that neither do the Vienna Convention, the Optional Protocol, the ICJ Charter and the UN Charter, *per se*, change U.S. domestic law. But when the right of Medellin to be informed that he may notify the Mexican Consulate of his detention was not accorded to him, the U.S. courts did not grant him a new trial, despite the ruling of the ICJ in **Avena**, because that move would have been a violation of the domestic procedural laws of the U.S. The circumstances in **Medellin** show that recognition by the U.S. Executive official alone that the VFA is binding on the U.S. is ineffective in actually enforcing rights sourced from the Agreement. Congressional law is necessary to enforce these rights in the U.S.

In **Bayan**, the majority of this Court held that the phrase "recognized as a treaty"[46][33] means that the other contracting party accepts or acknowledges the agreement as a treaty. **The salient question is: who has the authority to acknowledge it as a treaty?** Previously, it could have been argued that the President's recognition alone is sufficient; but all that is now changed with the categorical pronouncement in **Medellin** that Congress must enact statutes implementing the treaty, or the treaty itself must convey an intention that it be "self-executing" and is ratified on that basis, in order for the treaty to be enforced in the domestic sphere.

It must be noted that Article II, Section 2, Clause 2 of the U.S. Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." In the U.S., a "treaty" is only one of four types of international agreements, namely: Article II treaties, executive agreements pursuant to treaty, congressional executive agreements, and sole executive agreements.[47][34] The VFA is classified as a sole executive agreement.

Medellin, citing the **Youngstown** Framework, affirmed the tripartite scheme for evaluating executive action in this area:

> First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[48][35] Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[49][36] In this circumstance, Presidential authority can derive support from "congressional inertia, indifference or acquiescence."[50][37] Finally, "[w]hen the President takes measures incompatible with the express or implied will of Congress,

---

[46][33] CONSTITUTION, Art. XVIII, Sec. 25.
[47][34] Id. at p. 506.
[48][35] *Youngstown*, 343 U.S., at 635.
[49][36] Id at 637.
[50][37] Id.

his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[51][38]

The VFA is an executive agreement that does not derive any support from a treaty, or prior Congressional authorization or enactment. The VFA falls within the third category of the **Youngstown** Framework and, thus, **Presidential power is at its lowest ebb**. The President's actions cannot be sustained and enforced in the domestic sphere without congressional enactment or in the light of contrary legislation.

In **Medellin**, the Court also classified the Optional Protocol, the United Nations Charter, and the ICJ Statute as falling within the third and lowest category of the **Youngstown** Framework. The Court concluded, "given the absence of congressional legislation, that the non-self executing treaties at issue here did not 'express[ly] or implied[ly]' vest the President with the unilateral authority to make them self-executing. x x x x Non-self executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so x x x His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson's third category, not the first or even the second."[52][39]

(3) Congressional act is necessary to transform the international obligations brought about by the VFA.

At best, the VFA can be considered as an international commitment by the U.S., but "the responsibility of transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[53][40] It is therefore an error to perpetuate the ruling of the majority of this Court in **Bayan** that it is inconsequential

---

[51][38] Id. at 637-638
[52][39] 522 U.S. [Not yet numbered for citation purposes], pp. 31-32, March 25, 2008.
[53][40] 522 U.S. [Not yet numbered for citation purposes], p 30, March 25, 2008

whether the United States treats the VFA only as an executive agreement because, under international law, an executive agreement is binding as a treaty. **Medellin** has held that the binding effect of a treaty as an international obligation does not automatically mean that the treaty is enforceable in the domestic sphere.

Medellin tells us that the binding effect of the treaty is mutually exclusive from the actual enforcement of the rights and obligations sourced from it.

Though the VFA attaches international obligations to the parties to the agreement, it is irrelevant in the enforcement of a non-self-executory treaty in the domestic courts of the U.S. As long as the text of the VFA does not clearly show that it is self-executory and as long as U.S. Congress has not made it enforceable in the domestic sphere, it does not have obligatory force in U.S. domestic courts.

(4) There is an "asymmetry in the legal treatment" of the VFA.

The Philippine Senate has concurred in the ratification of the VFA by a two-thirds vote of its members. The Romulo-Kenny Agreement was entered into in implementation of Article V(6) of the VFA, and the custody over Daniel Smith was transferred from the Philippine Government to the U.S. Embassy.

The ruling in **Medellin** is proof that the U.S. cannot yet reciprocally enforce the provisions of the VFA. It highlights the obvious disparity in treatment of the VFA on the part of the United States.

I reiterate my dissent in **Bayan v. Zamora**, about the clear intention of the framers of the Constitution in imposing the requirement that the agreement must be "recognized by the other state as a treaty."[54][41] Recognition as a treaty by the other contracting state does

[54][41] CONSTITUTION, Article XVIII, Section 25.

not merely concern the procedure by which it is ratified, or whether or not it is concurred in by the Senate. The decisive mark to show that the agreement is considered as a treaty by the other contracting state is whether the agreement or treaty has obligatory effects and may be used as a source of rights enforceable in the domestic sphere of the other contracting party.

Medellin evidently shows us that the wording of the VFA does not bear this mark. Though considered as a treaty by the Executive, it may not create obligatory effects in the U.S.'s domestic sphere absent a clear statement in the text of the Agreement that it is self-executory, or without a congressional act implementing it.

Regardless of whether there is concurrence by the U.S. Senate in the RP-U.S. Mutual Defense Treaty, the disparity in the legal treatment of the VFA by the U.S. is clear, considering the **Medellin** ruling. Indeed, even assuming there is a Senate concurrence in the RP-U.S. Mutual Defense Treaty, the VFA still cannot be given domestic effect in the United States. It is up to the Court to decide whether the terms of a treaty reflect a determination by the President who negotiated it and the Senate that confirmed it if the treaty has domestic effect.[55[42]] To repeat, any treaty becomes enforceable within the U.S. only when the Court has determined it to be so, based on the clear terms of the treaty or through Congressional enactment to implement the provisions of the treaty.

It bears stressing that the RP government has already enforced the provisions of the VFA and has transferred custody of Lance Corporal Daniel Smith to U.S. authorities. The Philippine government has considered the VFA to be fully enforceable within our jurisdiction; yet, the U.S. does not look at the VFA as enforceable within its domestic jurisdiction. This dichotomy is evidently proscribed by the Constitution, for such dichotomy would render our sovereignty in tatters.

[55[42]] 522 U.S. [Not yet numbered for citation purposes], p. 29, March 25, 2008.

I vote to grant the petitions. Let the custody over Lance Corporal Daniel Smith be transferred from the U.S. Embassy in Manila to the New Bilibid Prison in Muntinlupa, pending final resolution of his appeal from conviction for the crime of rape.

REYNATO S. PUNO
Chief Justice

DISSENTING OPINION

CARPIO, *J.*:

I dissent because of a supervening event that took place after this Court decided *Bayan v. Zamora*[56][1] on 10 October 2000. In *Bayan*, this Court ruled that the Visiting Forces Agreement (VFA) between the Philippines and the United States of America was constitutional, having complied with Section 25, Article XVIII of the Philippine Constitution.

On 25 March 2008, the United States Supreme Court, in *Medellin v. Texas*,[57][2] ruled that a treaty, even if ratified by the United States Senate, is not enforceable as domestic federal law in the United States, unless the U.S. Congress enacts the implementing legislation, or the treaty by its terms is self-executory and ratified by the U.S. Senate as such.

Under *Medellin*, the VFA is indisputably not enforceable as domestic federal law in the United States. On the other hand, since the Philippine Senate ratified the VFA, the

---

56[1] 396 Phil 623 (2000).
57[2] 128 S.Ct. 1346; 170 L.Ed.2d 190.

VFA constitutes domestic law in the Philippines. This unequal legal status of the VFA violates Section 25, Article XVIII of the Philippine Constitution, which specifically requires that a treaty involving the presence of foreign troops in the Philippines must be equally binding on the Philippines and on the other contracting State.

In short, the Philippine Constitution bars the efficacy of such a treaty that is enforceable as domestic law only in the Philippines but unenforceable as domestic law in the other contracting State. The Philippines is a sovereign and independent State. It is no longer a colony of the United States. This Court should not countenance an unequal treaty that is not only contrary to the express mandate of the Philippine Constitution, but also an affront to the sovereignty, dignity and independence of the Philippine State.

There is no dispute that Section 25, Article XVIII of the Philippine Constitution governs the constitutionality of the VFA. Section 25 states:

> Section 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and **recognized as a treaty by the other contracting State**. (Emphasis supplied)

The clear intent of the phrase "**recognized as a treaty by the other contracting State**" is to insure that the treaty has the same legal effect on the Philippines as on the other contracting State. This requirement is unique to agreements involving the presence of foreign troops in the Philippines, along with the requirement, if Congress is so minded, to hold a national referendum for the ratification of such a treaty.

The deliberations of the Constitutional Commission reveal the sensitivity of the framers to the "unacceptable asymmetry" of the then existing military bases agreement

between the Philippines and the United States. The Philippine Senate had ratified the military bases agreement but the United States Government refused to submit the same to the U.S. Senate for ratification. Commissioner Blas Ople explained this "unacceptable asymmetry" in this manner:

> x x x But I think we have acknowledged starting at the committee level that the bases agreement was ratified by our Senate; **it is a treaty under Philippine law. But as far as the Americans are concerned, the Senate never took cognizance of this and, therefore, it is an executive agreement. That creates a wholly unacceptable asymmetry between the two countries**. Therefore, in my opinion, the right step to take, if the government of our country will deem it in the national interest to terminate this agreement or even to renegotiate it, is that we must begin with a clean slate; we should not be burdened by the flaws of the 1947 Military Bases Agreement. I think that is a very important point. I am glad to be reassured by the two Gentlemen that there is nothing in these proposals that will bar the Philippine government at the proper time from exercising the option of abrogation or termination.[58[3]] (Emphasis supplied)

Eventually, the Constitutional Commission required that any agreement involving the presence of foreign troops in the Philippines must be "**recognized as a treaty by the other contracting State**." This means that the other contracting State must recognize the agreement as a treaty, as distinguished from any other agreement, and if its constitutional processes require, submit the agreement to its proper legislative body for ratification as a treaty. As explained by Commissioner Father Joaquin Bernas, S.J., during the deliberations of the Constitutional Commission:

> Third, on the last phrase "AND RECOGNIZED AS A TREATY BY THE OTHER CONTRACTING NATION," **we enter into a treaty and we want the other contracting party to respect that document as a document possessing force in the same way that we respect it.** The present situation we have is that the bases agreement is a treaty as far as we are concerned, but it is only an executive agreement as far as the United States is

---

58[3] Vol. 4, Records of the Constitutional Commission, p 780.

concerned, because the treaty process was never completed in the United States because the agreement was not ratified by the Senate.

So, for these reasons, I oppose the deletion of this section because, first of all, as I said, it does not prevent renegotiation. Second, it respects the sovereignty of our people and the people will be in a better position to judge whether to accept the treaty or not, because then they will be voting not just on an abstraction but they will be voting after examination of the terms of the treaty negotiated by our government. And third, **the requirement that it be recognized as a treaty by the other contracting nation places us on the same level as any other contracting party.**[59[4]] (Emphasis supplied)

The following exchanges in the Constitutional Commission explain further the meaning of the phrase "**recognized as a treaty by the other contracting State**":

FR. BERNAS: Let me be concrete, Madam President, in our circumstances. Suppose they were to have this situation where our government were to negotiate a treaty with the United States, and then the two executive departments in the ordinary course of negotiation come to an agreement. As our Constitution is taking shape now, if this is to be a treaty at all, it will have to be submitted to our Senate for its ratification. Suppose, therefore, that what was agreed upon between the United States and the executive department of the Philippines is submitted and ratified by the Senate, then it is further submitted to the people for its ratification and subsequently, we ask the United States: "**Complete the process by accepting it as a treaty through ratification by your Senate as the United States Constitution requires," would such an arrangement be in derogation of sovereignty**?

MR. NOLLEDO: Under the circumstances the Commissioner just mentioned, Madam President, on the basis of the provision of Section 1 that "sovereignty resides in the Filipino people," then we would not consider that a derogation of our sovereignty on the basis and expectation that there was a plebiscite.[60[5]]

x x x

59[4] Id. at 774

60[5] Id. at 662.

> FR. BERNAS: As Commissioner Romulo indicated, since this certainly would refer only to the United States, because it is only the United States that would have the possibility of being allowed to have treaties here, then we would have to require that the Senate of the United States concur in the treaty because under American constitutional law, there must be concurrence on the part of the Senate of the United States to conclude treaties.
>
> MR. SUAREZ: Thank you for the clarification.
>
> Under the 1935 Constitution, if I recall it correctly, treaties and agreements entered into require an exchange of ratification. I remember that is how it was worded. We do not have in mind here an exchange of ratification by the Senate of the United States and by the Senate of the Philippines, for instance, but only an approval or a recognition by the Senate of the United States of that treaty.
>
> FR. BERNAS: **When I say that the other contracting state must recognize it as a treaty, by that I mean it must perform all the acts required for that agreement to reach the status of a treaty under their jurisdiction.**[61][6] (Emphasis supplied)

Thus, Section 25, Article XVIII of the Philippine Constitution requires that any agreement involving the presence of foreign troops in the Philippines must be **equally legally binding both on the Philippines and on the other contracting State.** This means the treaty must be enforceable under Philippine domestic law as well as under the domestic law of the other contracting State. Even Justice Adolfo S. Azcuna, the *ponente* of the majority opinion, and who was himself a member of the Constitutional Commission, **expressly admits** this when he states in his *ponencia*:

> The provision is thus designed to ensure that any agreement allowing the presence of foreign military bases, troops or facilities in Philippine territory shall be **equally binding on the Philippines and the foreign sovereign State involved. The idea is to prevent a recurrence of the situation where the terms and conditions governing the presence of foreign armed forces in our territory were binding on us but not upon the foreign State.** (Emphasis supplied)

---

[61][6] Id. at 781.

An "**equally binding**" treaty means exactly what it says - the treaty is enforceable as domestic law in the Philippines and likewise enforceable as domestic law in the other contracting State.

Medellin has stunned legal scholars in the United States and there is no escaping its legal effect on the VFA here in the Philippines. Even U.S. President George W. Bush had to bow to the ruling that he had no authority to enforce the Vienna Convention on Consular Relations in the United States in the absence of any implementing legislation by the U.S. Congress, **despite the fact that the U.S. Senate had ratified the Convention**. *Medellin* tersely states:

> **In sum, while treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."** (Emphasis supplied)

To drive home the point that the U.S. President cannot enforce the Convention in the United States, *Medellin* states that the "President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'"

Medellin acknowledges that even if the treaty is not enforceable under U.S. domestic law, it may still give rise to an obligation under international law on the part of the United States. The remedy of the other contracting State in case of breach of the treaty by the United States is to file an action before the International Court of Justice (ICJ). However, the United States will have to give its consent to the ICJ's jurisdiction because, as stated in *Medellin*, the United States had withdrawn in 1985 its advance consent to the general compulsory jurisdiction of the ICJ.

Assuming the United States consents to the ICJ's jurisdiction, any adverse decision against the United States would still be unenforceable under U.S. domestic law for the two reasons stated in *Medellin*. First, consent to the ICJ's jurisdiction is not consent to be bound by any decision of the ICJ. As *Medellin* puts it, "submitting to jurisdiction and agreeing to be bound are two different things."

Second, decisions of the ICJ have no immediate legal effect on U.S. domestic courts. ICJ decisions are not directives to domestic courts but matters addressed to the political branches of the State. As *Medellin* explains it:

> The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter - the provision that specifically addresses the effect of ICJ decisions. Article 94(1) provides that "[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party." x x x (emphasis added). The Executive Branch contends that the phrase "undertakes to comply" is not "an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members," but rather "a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision." x x x.
>
> We agree with this construction of Article 94. The Article is not a directive to domestic courts. It does not provide that the United States "shall" or "must" comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts. Instead, "[t]he words of Article 94 ... call upon governments to take certain action." x x x.

How then should the other contracting State enforce the ICJ decision against the United States if the political branches of the United States refuse to enforce the ICJ decision? *Medellin* points to Article 94(2) of the United Nations Charter, which provides that ICJ decisions shall be referred to the United Nations Security Council for enforcement if the losing State refuses to be bound by the ICJ decision. *Medellin* states:

> The U.N. Charter's provision of an express diplomatic - that is, nonjudicial - remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts. x x x First, the Security Council must "dee[m] necessary" the issuance of a recommendation or measure to effectuate the judgment. x x x. Second, as the President and Senate were undoubtedly aware in subscribing to the U.N. Charter and Optional Protocol, **the United States retained the unqualified right to exercise its veto of any Security Council resolution**.
>
> This was the understanding of the Executive Branch when the President agreed to the U.N. Charter and the declaration accepting general compulsory ICJ jurisdiction. x x x ("[I]f a state fails to perform its obligations under a judgment of the [ICJ], the other party may have recourse to the Security Council"); x x x ("[W]hen the Court has rendered a judgment and one of the parties refuses to accept it, then the dispute becomes political rather than legal. It is as a political dispute that the matter is referred to the Security Council"); x x x (while parties that accept ICJ jurisdiction have "a moral obligation" to comply with ICJ decisions, Article 94(2) provides the exclusive means of enforcement). (Emphasis supplied)

Obviously, the Philippines cannot take comfort that the VFA can still give rise to an obligation under international law on the part of the United States, even as the VFA does not constitute domestic law in the United States. Assuming that the United States will submit to the jurisdiction of the ICJ, the futility of relying on the Security Council to enforce the ICJ decision is apparent. In the chilling words of *Medellin*, "**the United States retained the unqualified right to exercise its veto of any Security Council resolution.**" The only way to avoid this veto of the United States is to make the treaty part of U.S. domestic law.

It would be naïve and foolish for the Philippines, or for any other State for that matter, to implement as part of its domestic law a treaty that the United States does not recognize as part of its own domestic law. That would only give the United States the "**unqualified right**" to free itself from liability for any breach of its own obligation under the treaty, despite an adverse ruling from the ICJ.

The wisdom of the framers in crafting Section 25, Article XVIII of the Philippine Constitution is now apparent. The other contracting State must **"recognize as a treaty"** any agreement on the presence of foreign troops in the Philippines, and such treaty must be **equally binding** on the Philippines and on the other contracting State. In short, if the treaty is part of domestic law of the Philippines, it must also be part of domestic law of the other contracting State. Otherwise, the treaty cannot take effect in the Philippines.

Medellin recognized that at least some 70-odd treaties of the United States would be affected by the ruling that a treaty, even if ratified by the U.S. Senate, is not self-executory. *Medellin* even proffered a solution - legislation by the U.S. Congress giving wholesale effect to such ratified treaties. *Medellin* explains:

> The dissent worries that our decision casts doubt on some 70-odd treaties under which the United States has agreed to submit disputes to the ICJ according to "roughly similar" provisions. x x x Again, under our established precedent, some treaties are self-executing and some are not, depending on the treaty. That the judgment of an international tribunal might not automatically become domestic law hardly means the underlying treaty is "useless." x x x Such judgments would still constitute international obligations, the proper subject of political and diplomatic negotiations. x x x **And Congress could elect to give them wholesale effect (rather than the judgment-by-judgment approach hypothesized by the dissent, x x x) through implementing legislation, as it regularly has.** x x x (Emphasis supplied)

The VFA is not among the 70-odd treaties because the United States does not even consider the VFA a treaty but merely an executive agreement. The U.S. Senate did not ratify the VFA because under the United States Constitution only treaties are required to be ratified. The important difference between a treaty and an executive agreement is that a ratified treaty automatically repeals a prior inconsistent law, while an executive agreement cannot but must be consistent with existing laws. The U.S. State Department has explained the distinction between treaties and executive agreements in this manner:

> x x x it may be desirable to point out here the well-recognized distinction between an executive agreement and a treaty. In brief, it is that the former cannot alter the existing law and must conform to all statutory enactments, whereas a treaty, if ratified by and with the advice and consent of two-thirds of the Senate, as required by the Constitution, itself becomes the supreme law of the land and takes precedence over any prior statutory enactments.[62[7]]

With *Medellin*, the treaty must not only be ratified, but must also be ratified as self-executory, or an implementing legislation must be adopted, before it can repeal a prior inconsistent law.

Executive agreements are not ratified by the U.S. Senate but merely notified to the U.S. Congress under the Case-Zablocki Act, **which does not apply to treaties**. Notification under the Case-Zablocki Act does not enact the executive agreement into domestic law of the United States. On the other hand, "the failure to transmit to Congress under the Case-Zablocki Act x x x does not alter the legal effect of an (executive) agreement."[63[8]] The Case-Zablocki Act operates merely as a timely notification to the U.S. Congress of the executive agreements, "**other than a treaty**," that the U.S. President has entered into with foreign States. This is clear from the provisions of the Case-Zablocki Act:

> Section 112b. United States international agreements; transmission to Congress
>
> (a) The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), **other than a treaty**, to which the United States is a party as soon as practicable after

---

62[7] Prof. Edwin Borchard (Justus S Hotchkiss Professor of Law, Yale Law School), *Treaties and Executive Agreements – A Reply*, Yale Law Journal, June 1945, citing Current Information Series, No. 1, 3 July 1934, quoted in 5 Hackworth, Digest of International Law (1943) pp 425-6.

63[8] Dr. Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense. An Agenda for Progress*, Boston University International Law Journal, Spring 1995.

such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President. Any department or agency of the United States Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than twenty days after such agreement has been signed.

(b) Not later than March 1, 1979, and at yearly intervals thereafter, the President shall, under his own signature, transmit to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate a report with respect to each international agreement which, during the preceding year, was transmitted to the Congress after the expiration of the 60-day period referred to in the first sentence of subsection (a), describing fully and completely the reasons for the late transmittal.

(c) Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State. Such consultation may encompass a class of agreements rather than a particular agreement

(d) The Secretary of State shall determine for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of this section.

(e) The President shall, through the Secretary of State, promulgate such rules and regulations as may be necessary to carry out this section.[64[9]] (Emphasis supplied)

The Case-Zablocki Act mandates the notification to the U.S. Congress of executive agreements "**other than a treaty**." The purpose of the Case-Zablocki Act is "to address the lack of legal constraints over the President's choice of the form of an agreement,"[65[10]]

64[9] Case-Zablocki Act of 22 August 1972 -- 1 USC 112b.

65[10] See Note 8.

whether an executive agreement or a treaty. It allows the U.S. Congress to timely monitor if an agreement is mislabeled as an executive agreement when it should be a treaty subject to U.S. Senate ratification. As one commentator explained:

> If Congress is dissatisfied with the character or lack of consultation on the form of an agreement, or with the content of the agreement itself, it has other means of making its displeasure known. In the exercise of its oversight power, Congress could hold hearings, as it did in 1976 on the United States-Turkish Defense Cooperation Agreement, to consider the merits of concluding such an agreement at a time of tension involving one or more nations relevant to the agreement. At any time Congress can also modify an executive agreement, as it can a treaty, by enacting subsequent contrary legislation. Congress has taken such action in the past, regrettably placing the United States in the position of breaching the agreement under international law. Finally, Congress could withhold funding for an executive agreement. To date, Congress has not exercised its "spending power" in this manner, except as to isolated issues. "Spending power" is likely to be used by Congress only as a last resort.[66[11]]

The fact that the U.S. State Department notified the VFA to the U.S. Congress under the Case-Zablocki Act, and the U.S. Congress has not objected to the characterization of the VFA as an executive agreement, is incontrovertible proof that the VFA is not a treaty but merely an executive agreement as far as the United States Government is concerned. **In short, the United States does not recognize the VFA as a treaty**. It is also an admission that the VFA does not have the status of domestic law in the United States. Notification under the Case-Zablocki Act is obviously far less significant legally than ratification by the U.S. Senate of a treaty. If a ratified treaty does not automatically become part of U.S. domestic law under *Medellin*, with more reason a merely notified executive agreement does not form part of U.S. domestic law.

Clearly, the United States Government does not recognize the VFA as a treaty but merely as an executive agreement. For the VFA to be constitutional under Section 25,

---

66[11] Id.

Article XVIII of the Philippine Constitution, the United States must first recognize the VFA as a treaty, and then ratify the VFA to form part of its domestic law. In the words of Father Bernas, the United States must "**[c]omplete the process by accepting [the VFA] as a treaty through ratification by [the U.S.] Senate as the United States Constitution requires.**" *Medellin* has now added the further requirement that the U.S. Congress must adopt an implementing legislation to the VFA, or the VFA must be renegotiated to make it self-executory and ratified as such by the U.S. Senate. Unless and until this is done, the VFA is not "recognized as a treaty" by the United States, and thus it cannot be given effect in the Philippines.

Under *Medellin*, the 1952 RP-US Mutual Defense Treaty (MDT) is not part of the domestic law of the United States and the U.S. President has no power to enforce the MDT under U.S. domestic law. Based on the *Medellin* requirements for a treaty to be binding and enforceable under U.S. domestic law, the MDT suffers the same fate as the Vienna Convention on Consular Relations. Both the MDT and the Convention were ratified by the U.S. Senate. However, both the MDT and the Convention contain only the usual *ratification* and *entry into force* provisions found in treaties. Thus:

Vienna Convention on Consular Relations

Article 75
Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

x x x

Article 77
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

RP-US Mutual Defense Treaty

Article VII. This Treaty shall be ratified by the Republic of the Philippines and the United States of America in accordance with their respective constitutional processes and will come into force when instruments of ratification thereof have been exchanged by them in Manila.

Both the MDT and the Convention do not contain any provision making them self-executory once ratified by the U.S. Senate. The U.S. Congress has also not adopted any implementing legislation for the MDT or the Convention. Consequently, the VFA, as an executive agreement, cannot depend for its legal efficacy on the MDT because the MDT itself, under *Medellin*, is not binding and enforceable under U.S. domestic law, just like the Convention.

In summary, the VFA fails to comply with Section 25, Article XVIII of the Philippine Constitution requiring the United States to "**recognize as a treaty**" the VFA. This Court cannot allow the implementation of the VFA by the Philippine Government unless and until the United States recognizes the VFA as a treaty. This means that the VFA must be ratified by the U.S. Senate and made part of U.S. domestic law in accordance with *Medellin*. Only when this process is completed can this Court allow the implementation of the VFA. In the meantime, the accused Lance Corporal Daniel Smith

of the U.S. Armed Forces should be subject to the same Philippine laws governing an accused in similar cases, without the application of the VFA or its subsidiary agreements.

Accordingly, I vote to (1) **DECLARE** the Visiting Forces Agreement incomplete and ineffective and thus **UNENFORCEABLE**, and to (2) **ORDER** the Director-General of the Philippine National Police, as well as the Secretary of Foreign Affairs, to immediately cause the transfer of the accused Lance Corporal Daniel Smith from the custody of the U.S. Embassy in Manila to the New Bilibid prison in Muntinlupa pending final resolution of his appeal from conviction for the crime of rape.

ANTONIO T. CARPIO
Associate Justice

AGREEMENT

Between the

**GOVERNMENT OF THE
REPUBLIC OF THE PHILIPPINES**

and the

**GOVERNMENT OF THE UNITED STATES OF AMERICA
Regarding the Treatment of United States Armed Forces
Visiting the Philippines**

Preamble

The Government of the United States of America and the Government of the Republic of the Philippines,

Reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to

strengthen international and regional security in the Pacific area;

Reaffirming their obligations under the Mutual Defense Treaty of August 30, 1951;

Noting that from time to time elements of the United States armed forces may visit the Republic of the Philippines;

Considering that cooperation between the United States and the Republic of the Philippines promotes their common security interests;

Recognizing the desirability of defining the treatment of United States personnel visiting the Republic of the Philippines;

Have agreed as follows:

Article I
Definitions

As used in this Agreement, "United States personnel" means United States military and civilian personnel temporarily in the Philippines in connection with activities approved by the Philippine Government. Within this definition:

1. The term "military personnel" refers to military members of the United States Army, Navy, Marine Corps, Air Force, and Coast Guard.

2. The term "civilian personnel" refers to individuals who are neither nationals of nor ordinarily resident in the Philippines and who are employed by the United States armed forces or who are accompanying the United States armed forces, such as employees of the American Red Cross and the United Services Organization.

Article II
Respect for Law

It is the duty of United States personnel to respect the laws of the Republic of the Philippines and to abstain from any activity inconsistent with the spirit of this agreement,

and, in particular, from any political activity in the Philippines. The Government of the United States shall take all measures within its authority to ensure that this is done.

Article III
Entry and Departure

1. The Government of the Philippines shall facilitate the admission of United States personnel and their departure from the Philippines in connection with activities covered by this agreement.

2. United States military personnel shall be exempt from passport and visa regulations upon entering and departing the Philippines.

3. The following documents only, which shall be presented on demand, shall be required in respect of United States military personnel who enter the Philippines:

(a) personal identity card issued by the appropriate United States authority showing full name, date of birth, rank or grade and service number (if any), branch of service and photograph; and

(b) individual or collective document issued by the appropriate United States authority, authorizing the travel or visit and identifying the individual or group as United States military personnel.

(c) the commanding officer of a military aircraft or vessel shall present a declaration of health, and when required by the cognizant representative of the Government of the Philippines, shall conduct a quarantine inspection and will certify that the aircraft or vessel is free from quarantinable diseases. Any quarantine inspection of United States aircraft, or vessels, or cargoes thereon, shall be conducted by the United States commanding officer in accordance with the international health regulations as promulgated by

the World Health Organization, and mutually agreed procedures.

4. United States civilian personnel shall be exempt from visa requirements but shall present, upon demand, valid passports upon entry and departure of the Philippines.

5. If the Government of the Philippines has requested the removal of any United States personnel from its territory, the United States authorities shall be responsible for receiving the person concerned within its own territory or otherwise disposing of said person outside of the Philippines.

Article IV
Driving and Vehicle Registration

1. Philippine authorities shall accept as valid, without test or fee, a driving permit or license issued by the appropriate United States authority to United States personnel for the operation of military or official vehicles.

2. Vehicles owned by the Government of the United States need not be registered, but shall have appropriate markings.

Article V
Criminal Jurisdiction

1. Subject to the provisions of this article:

(a) Philippine authorities shall have jurisdiction over United States personnel with respect to offenses committed within the Philippines and punishable under the law of the Philippines.

(b) United States military authorities shall have the right to exercise within the Philippines all criminal and disciplinary jurisdiction conferred on them by the military law of the United States over United States personnel in the Philippines.

2. (a) Philippine authorities exercise exclusive jurisdiction over United States personnel with respect to offenses, including offenses relating to the security of the

Philippines, punishable under the laws of the Philippines, but not under the laws of the United States.

(b) United States authorities exercise exclusive jurisdiction over United States personnel with respect to offenses, including offenses relating to the security of the United States, punishable under the laws of the United States, but not under the laws of the Philippines.

(c) For the purposes of this paragraph and paragraph 3 of this article, an offense relating to security means:

(1) treason;

(2) sabotage, espionage or violation of any law relating to national defense.

3. In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:

(a) Philippine authorities shall have the primary right to exercise jurisdiction over all offenses committed by United States personnel, except in cases provided for in paragraphs 1 (b), 2 (b), and 3 (b) of this Article.

(b) United States military authorities shall have the primary right to exercise jurisdiction over United States personnel subject to the military law of the United States in relation to:

(1) offenses solely against the property or security of the United States or offenses solely against the property or person of United States personnel; and

(2) offenses arising out of any act or omission done in performance of official duty.

(c) The authorities of either government may request the authorities of the other government to

waive their primary right to exercise jurisdiction in a particular case.

(d) Recognizing the responsibility of the United States military authorities to maintain good order and discipline among their forces, Philippine authorities will, upon request by the United States, waive their primary right to exercise jurisdiction except in cases of particular importance to the Philippines. If the Government of the Philippines determines that the case is of particular importance, it shall communicate such determination to the United States authorities within twenty (20) days after the Philippine authorities receive the United States request.

(e) When the United States military commander determines that an offense charged by authorities of the Philippines against United States personnel arises out of an act or omission done in the performance of official duty, the commander will issue a certificate setting forth such determination. This certificate will be transmitted to the appropriate authorities of the Philippines and will constitute sufficient proof of performance of official duty for the purposes of paragraph 3(b)(2) of this article. In those cases where the Government of the Philippines believes the circumstances of the case require a review of the duty certificate, United States military authorities and Philippine authorities shall consult immediately. Philippine authorities at the highest levels may also present any information bearing on its validity. United States military authorities shall take full account of the Philippine position. Where appropriate, United States military authorities will take disciplinary or other action against offenders in official duty cases, and notify the Government of the Philippines of the actions taken.

(f) If the government having the primary right does not exercise jurisdiction, it shall notify the authorities of the other government as soon as possible.

(g) The authorities of the Philippines and the United States shall notify each other of the disposition of all cases in which both the authorities of the Philippines and the United States have the right to exercise jurisdiction.

4. Within the scope of their legal competence, the authorities of the Philippines and the United States shall assist each other in the arrest of United States personnel in the Philippines and in handing them over to authorities who are to exercise jurisdiction in accordance with the provisions of this article.

5. United States military authorities shall promptly notify Philippine authorities of the arrest or detention of United States personnel who are subject to Philippine primary or exclusive jurisdiction. Philippine authorities shall promptly notify United States military authorities of the arrest or detention of any United States personnel.

6. The custody of any United States personnel over whom the Philippines is to exercise jurisdiction shall immediately reside with United States military authorities, if they so request, from the commission of the offense until completion of all judicial proceedings. United States military authorities shall, upon formal notification by the Philippine authorities and without delay, make such personnel available to those authorities in time for any investigative or judicial proceedings relating to the offense with which the person has been charged. In extraordinary cases, the Philippine Government shall present its position to the United States Government regarding custody, which the United States Government shall take into full account. In the event Philippine judicial proceedings are not completed within one year, the United States shall be relieved of any obligations under this paragraph. The one year period will not include the time necessary to appeal. Also, the one year period will not include any time during which scheduled trial procedures are delayed because United States authorities, after timely notification by Philippine authorities to arrange for the presence of the accused, fail to do so.

7. Within the scope of their legal authority, United States

and Philippine authorities shall assist each other in the carrying out of all necessary investigations into offenses and shall cooperate in providing for the attendance of witnesses and in the collection and production of evidence, including seizure and, in proper cases, the delivery of objects connected with an offense.

8. When United States personnel have been tried in accordance with the provisions of this article and have been acquitted or have been convicted and are serving, or have served their sentence, or have had their sentence remitted or suspended, or have been pardoned, they may not be tried again for the same offense in the Philippines. Nothing in this paragraph, however, shall prevent United States military authorities from trying United States personnel for any violation of rules of discipline arising from the act or omission which constituted an offense for which they were tried by Philippine authorities.

9. When United States personnel are detained, taken into custody, or prosecuted by Philippine authorities, they shall be accorded all procedural safeguards established by the law of the Philippines. At the minimum, United States personnel shall be entitled:

(a) To a prompt and speedy trial;

(b) To be informed in advance of trial of the specific charge or charges made against them and to have reasonable time to prepare a defense;

(c) To be confronted with witnesses against them and to cross examine such witnesses;

(d) To present evidence in their defense and to have compulsory process for obtaining witnesses;

(e) To have free and assisted legal representation of their own choice on the same basis as nationals of the Philippines;

(f) To have the services of a competent interpreter;

(g) To communicate promptly with and to be visited

regularly by United States authorities, and to have such authorities present at all judicial proceedings. These proceedings shall be public unless the court, in accordance with Philippine law, excludes persons who have no role in the proceedings.

10. The confinement or detention by Philippine authorities of United States personnel shall be carried out in facilities agreed on by appropriate Philippine and United States authorities. United States personnel serving sentences in the Philippines shall have the right to visits and material assistance.

11. United States personnel shall be subject to trial only in Philippine courts of ordinary jurisdiction, and shall not be subject to the jurisdiction of Philippine military or religious courts.

Article VI
Claims

1. Except for contractual arrangements, including United States foreign military sales letters of offer and acceptance and leases of military equipment, both governments waive any and all claims against each other for damage, loss or destruction to property of each other's armed forces or for death or injury to their military and civilian personnel arising from activities to which this aggreement applies.

2. For claims against the United States, other than contractual claims and those to which paragraph 1 applies, the United States Government, in accordance with United States law regarding foreign claims, will pay just and reasonable compensation in settlement of meritorious claims for damage, loss, personal injury or death, caused by acts or omissions of United States personnel, or otherwise incident to the non-combat activities of the United States forces.

Article VII
Importation and Exportation

1. United States Government equipment, materials, supplies, and other property imported into or acquired in the Philippines by or on behalf of the United States armed forces in connection with activities to which this agreement applies, shall be free of all Philippine duties, taxes and other similar charges. Title to such property shall remain with the United States, which may remove such property from the Philippines at any time, free from export duties, taxes, and other similar charges. The exemptions provided in this paragraph shall also extend to any duty, tax, or other similar charges which would otherwise be assessed upon such property after importation into, or acquisition within, the Philippines. Such property may be removed from the Philippines, or disposed of therein, provided that disposition of such property in the Philippines to persons or entities not entitled to exemption from applicable taxes and duties shall be subject to payment of such taxes, and duties and prior approval of the Philippine Government.

2. Reasonable quantities of personal baggage, personal effects, and other property for the personal use of United States personnel may be imported into and used in the Philippines free of all duties, taxes and other similar charges during the period of their temporary stay in the Philippines. Transfers to persons or entities in the Philippines not entitled to import privileges may only be made upon prior approval of the appropriate Philippine authorities including payment by the recipient of applicable duties and taxes imposed in accordance with the laws of the Philippines. The exportation of such property and of property acquired in the Philippines by United States personnel shall be free of all Philippine duties, taxes, and other similar charges.

Article VIII
Movement of Vessels and Aircraft

1. Aircraft operated by or for the United States armed forces may enter the Philippines upon approval of the Government of the Philippines in accordance with procedures stipulated in implementing arrangements.

2. Vessels operated by or for the United States armed forces may enter the Philippines upon approval of the Government of the Philippines. The movement of vessels shall be in

accordance with international custom and practice governing such vessels, and such agreed implementing arrangements as necessary.

3. Vehicles, vessels, and aircraft operated by or for the United States armed forces shall not be subject to the payment of landing or port fees, navigation or overflight charges, or tolls or other use charges, including light and harbor dues, while in the Philippines. Aircraft operated by or for the United States armed forces shall observe local air traffic control regulations while in the Philippines. Vessels owned or operated by the United States solely on United States Government non-commercial service shall not be subject to compulsory pilotage at Philippine ports.

Article IX
Duration and Termination

This agreement shall enter into force on the date on which the parties have notified each other in writing through the diplomatic channel that they have completed their constitutional requirements for entry into force. This agreement shall remain in force until the expiration of 180 days from the date on which either party gives the other party notice in writing that it desires to terminate the agreement.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective governments, have signed this agreement.

DONE in duplicate at Manila, The Philippines, this 10th day of February, 1998.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Thomas C. Hubbard

FOR THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES

Domingo L. Siazon, Jr.